

IT IS ORDERED as set forth below:

Date: April 3, 2014



Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CASE NO. 12-80104-WLH
)	
NORTHLAKE HOTELS, INC.,)	CHAPTER 11
)	
Debtor.)	JUDGE WENDY L. HAGENAU
)	

**ORDER SUSTAINING DEBTOR'S OBJECTION TO AMENDED CLAIM NO. 4
OF SHALLOWFORD INVESTORS, LLC**

The Debtor's Objection to the Amended Claim No. 4 of Shallowford Investors, LLC [Docket No. 165] came before this Court for hearing, after notice, on April 1, 2014. John A. Christy and J. Carole Thompson Hord appeared for the Debtor, and Brian P. Hall and Nicholas J. Roecker appeared for Shallowford Investors, LLC. For the reasons stated on the record, and herein, the Objection is SUSTAINED.

Northlake Hotels, Inc. ("Northlake") filed this bankruptcy petition under Chapter 11 of the United States Bankruptcy Code on December 4, 2012. By order dated August 14, 2013 [Docket No. 68], the Court set September 30, 2013 as the last day on which to file proofs of

claim. Shallowford Investors, LLC (“Shallowford”) is the Debtor’s major creditor, secured by the hotel owned by the Debtor. Shallowford filed its initial proof of claim on September 30, 2013. In this claim, Shallowford asserted a total claim of \$1,242,344.99. This claim included principal of \$1,224,412.22 and interest of \$17,932.77. The claim included the following reservation: “To the extent the value of the collateral securing Shallowford’s claim is less than Shallowford’s claim, Shallowford reserves the right to pursue an unsecured claim, and to the extent the value of the collateral is greater than its claim, Shallowford reserves its right to collect post-petition interest, attorneys’ fees and costs pursuant to 11 U.S.C. Section 506(b).”

Shallowford has been exceedingly active in this bankruptcy case. It filed its initial motion for relief from stay on December 26, 2012, it has been the subject of two adversary proceedings brought by the Debtor against it, and it has objected to almost every request of the Debtor in the case. After the passage of the bar date, the Debtor filed an amended plan proposing to pay Shallowford’s claim in the amount of the outstanding balance owed to Shallowford or the value of the property as determined by the Court, whichever was less. The Debtor also filed a motion to determine the value of the property and an objection to Shallowford’s initial claim.

Northlake’s objection to the initial claim argued that (i) there was no right to collect post-petition interest and attorney’s fees under 11 U.S.C. § 506(b) because there was no agreement by the Debtor to pay attorney’s fees and (ii) because Shallowford’s claim was a non-recourse claim outside of bankruptcy, it could not have a deficiency claim. Shallowford responded to the claim objection and, after hearing, the Court entered an order that the hypothecation agreement signed by the Debtor was an “agreement” for purposes of Section 506(b) and that Shallowford would be

entitled to a deficiency claim if the value of the property was less than the total amount of Shallowford's claim.

Shallowford also objected to the Debtor's disclosure statement on numerous grounds. Shallowford objected to the Debtor's plan to use marshaling, objected to certain factual statements made in the disclosure statement, objected to the lack of financial information, and objected to the fact the Debtor's plan did not provide for a potential unsecured deficiency claim of Shallowford if one should exist. In its objection to the disclosure statement, Shallowford stated, "Shallowford filed a proof of claim in the amount of \$1,224,412.22 but the fair market value of the property has not been established. Given the Debtor's own statements about the depressed market values for hotel properties, it is conceivable that Shallowford would be entitled to an unsecured deficiency claim." In response, the Debtor amended the plan and disclosure statement on December 9, 2013, and provided that Shallowford's claim was an allowed secured claim in the amount of \$1,242,345.00, the full amount identified by Shallowford in its proof of claim. The Debtor did not provide for the treatment of any deficiency claim of Shallowford, as none was identified in the proof of claim. The Debtor withdrew its motion to value property and the Court entered a scheduling order on December 13, 2013, ordering that Shallowford must file a motion to value the property by December 20, 2013 if it contested the Debtor's valuation of \$1,242,345.00. The Court also set a deadline for Shallowford to make an election under 11 U.S.C. § 1111(b). No motion to value the property was filed by Shallowford, so the value of the property was then fixed at \$1,242,345.00, the amount of Shallowford's claim. An order and notice approving the disclosure statement was entered on December 19, 2013, with the deadline for ballots being set for January 31, 2014.

On January 31, 2014, Shallowford filed an amended proof of claim, this time asserting a total claim of \$1,551,953.94 consisting of principal of \$1,224,412.22, interest of \$17,932.77, and post-petition attorney's fees of \$309,608.95. The principal and interest numbers remained the same as in the first proof of claim filed by Shallowford, so the amendment added the attorney's fees of over \$300,000. On the same date, Shallowford filed a ballot voting this new unsecured claim in Class 2. It then objected to the plan on the basis that the Debtor did not have an accepting impaired class since Shallowford's Class 2 ballot rejecting the plan dominated the class. In response, the Debtor filed its objection on the basis that the claim for attorney's fees was late filed, not adequately supported by documentation, not reasonable, and not entitled to be allowed under the law.

The Eleventh Circuit has stated that amendment to a claim is freely allowed "where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim." In re International Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir. 1985). Nevertheless, the Court "must subject post bar date amendments to careful scrutiny to assure that there was no attempt to file a new claim under the guise of an amendment". Id. Moreover, the Eleventh Circuit held it was appropriate for the bankruptcy court to consider various equitable factors set out in the case of In re Miss Glamour Coat Co., 1980 WL 1668 (S.D. N.Y. 1980) as follows:

1. Whether the debtors and creditors relied upon the earlier proofs of claim or whether they had reason to know that subsequent proofs of claim would be filed;
2. Whether other creditors would receive a windfall by the court's refusing to allow the amendment;

3. Whether the claimholder intentionally or negligently delayed in filing its amendment to the proof of claim;
4. The justification for failing to timely file the amendment or to obtain an extension of the bar date; and
5. Whether equity requires consideration of any other factors.

Id. cited in International Horizons, 751 F.2d at 1218. See also In the matter of Durango Georgia Paper Company, 314 B.R. 885, 888 (Bankr. S.D. Ga. 2004); In re Fowler, 2006 WL 6591597 (Bankr. N.D. Ga. July 10, 2006).

Shallowford argues in this case that its amendment to add actual post-petition attorney's fees was preserved by virtue of its reservation in its original proof of claim, which reserved the right to file an unsecured deficiency claim and reserved its right to collect post-petition attorney's fees under Section 506(b). The Debtor responds that, because Shallowford is not oversecured, it has no claim for attorney's fees under Section 506(b) and it did not reserve the right to add attorney's fees under any other section of the Code. Moreover, the Debtor argues the reservation in the original proof of claim to file an unsecured claim was based solely on the valuation of the property, which at the time had not been ascertained. The Debtor contends this is a new claim, not reserved in the original proof of claim. The Court agrees this amendment is not covered by the reservation in the first claim.

Moreover, since Shallowford is not oversecured, it has no claim for attorney's fees under Section 506(b). (Shallowford agrees.) It's only claim for attorney's fees would be based on the terms of the contract and state law. Under Georgia law, O.C.G.A. § 13-1-11 governs the collection of attorney's fees. It provides that attorney's fees may be collected only if notice is given to the obligor and an opportunity is provided to pay all amounts due other than attorney's

fees within 10 days. Upon the giving of notice and the passage of 10 days, the right to statutory attorney's fees becomes fixed. O.C.G.A. § 13-1-11 provides further that, if the contract provides for "reasonable fees" (which is what Shallowford's contract provides), reasonable fees shall be 15% of the first \$500 of principal and interest due and 10% of the balance. There is no provision under Georgia law for Shallowford to have collected actual attorney's fees, either pre- or post-petition. It was limited to statutory fees. Shallowford gave the appropriate notice in 2011, more than a year before the Debtor filed this bankruptcy case. Therefore, it could have included statutory attorney's fees in its original proof of claim as its right to those fees was fixed at the time the petition was filed.

The original proof of claim filed by Shallowford was silent as to the collection of statutory attorney's fees. Given the ambiguity in the original claim, it is possible the statutory attorney's fees were included in the principal line, but they were not identified as such. Shallowford clarified at the hearing on this matter that statutory attorney's fees were not included in its original proof of claim either in the actual amount claimed or in the reservation of rights. When asked if there was a reason why they were not included, Shallowford had no justification for not including them in the claim at the outset. Moreover, Shallowford had no justification for filing the amended claim seeking \$309,000 in post-petition actual attorney's fees in any event. Shallowford acknowledged at the hearing that its claim was limited by O.C.G.A. § 13-1-11 and all it was entitled to was its statutory fees. Since the amended proof of claim asserts a claim for attorney's fees that are simply not allowable and no legal basis exists for allowing them, the claim is not allowable. Interestingly, Shallowford has never asserted a claim to statutory attorney's fees in any of its proofs of claim.

Further, to the extent any claim for statutory attorney's fees could be deemed an amendment because the claim arises out of the same hypothecation agreement and security deed that were attached to the original proof of claim, the Court finds for equitable reasons that the claim should not be allowed. First, there is no doubt the Debtor relied upon the earlier proof of claim in modifying its plan of reorganization. It specifically amended its plan to set the value of the property in an amount that would eliminate any possibility of an unsecured deficiency claim. Shallowford had the right to contest that valuation and chose not to do so. Secondly, no justification has been given by Shallowford for failing to include statutory attorney's fees in its original proof of claim and its failure to do so was at least negligent, if not intentional. The timing of the filing of the amendment coupled with Shallowford's heavy participation in this case throughout and the Debtor's reliance on the original proof of claim convince the Court that equity requires the claim be disallowed. Allowing the claim at this late date, seemingly for the sole purpose of dominating a class and prohibiting the Debtor from having one impaired class accepting the plan, is unfair not only to the Debtor but also to the other creditors, who will be paid under the plan. Therefore, it is hereby

ORDERED that Debtor's objection to the attorney's fees asserted in Claim No. 4-2 is SUSTAINED.

END OF ORDER

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